

DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

MONETARY PENALTY NOTICE

To: Pension House Exchange Limited

Of: 72 Temple Chambers, Temple Avenue, London EC4Y 0HP

1. The Information Commissioner ("Commissioner") has decided to issue Pension House Exchange Limited ("PHE") with a monetary penalty under section 55A of the Data Protection Act 1998 ("DPA"). The penalty is being issued because of a serious contravention of regulation 21B of the Privacy and Electronic Communications (EC Directive) Regulations 2003.
2. This notice explains the Commissioner's decision.

Legal framework

3. PHE, whose registered office is given above (Companies House Registration Number: 10385681) is the organisation stated in this notice to have used a public electronic communications service for the purpose of making unsolicited calls for the purposes of direct marketing in relation to occupational pension schemes or personal pension schemes contrary to regulation 21B of PECR.

4. Regulation 21B paragraph (1) of PECR provides that:

“(1) A person must not use, or instigate the use of, a public electronic communications service to make unsolicited calls to an individual for the purpose of direct marketing in relation to occupational pension schemes or personal pension schemes, except where paragraph (2) or (3) applies.”

5. Regulation 21B paragraphs (2), (3), and (4) provide that:

“(2) This paragraph applies where—

- (a) the caller is an authorised person or a person who is the trustee or manager of an occupational pension scheme or a personal pension scheme; and
- (b) the called line is that of an individual who has previously notified the caller that for the time being the individual consents to such calls being made by the caller on that line.

(3) This paragraph applies where—

- (a) the caller is an authorised person or a person who is the trustee or manager of an occupational pension scheme or a personal pension scheme;
- (b) the recipient of the call has an existing client relationship with the caller on the line and the relationship is such that the recipient might reasonably envisage receiving unsolicited calls for the purpose of direct marketing in relation to occupational pension schemes or personal pension schemes; and

- (c) the recipient of the call has been given a simple means of refusing (free of charge except for the costs of the transmission of the refusal) the use of the recipient's contact details for the purpose of such direct marketing, at the time that the details were initially collected and, where the recipient did not initially refuse the use of the details, at the time of each subsequent communication.

(4) A subscriber must not permit the subscriber's line to be used in contravention of paragraph (1)".

6. Regulation 21B paragraph 5 materially states that:

"(5) In this regulation—

- (a) "authorised person" has the meaning given in section 31 of the Financial Services and Markets Act 2000;
- (b) "direct marketing in relation to occupational pension schemes or personal pension schemes" includes—
 - (i) the marketing of a product or service to be acquired using funds held, or previously held, in an occupational pension scheme or a personal pension scheme,
 - (ii) the offer of any advice or other service that promotes, or promotes the consideration of, the withdrawal or transfer of funds from an occupational pension scheme or a personal pension scheme, and
 - (iii) the offer of any advice or other service to enable the assessment of the performance of

an occupational pension scheme or a personal pension scheme (including its performance in comparison with other forms of investment);

- (c) "existing client relationship" does not include a relationship established at the instigation of the caller primarily for the purpose of avoiding the restriction in paragraph (1); and
- (d) "occupational pension scheme" and "personal pension scheme" have the meanings given in section 1(1) of the Pension Schemes Act 1993."

7. Consent is defined in Article 4(11) the General Data Protection Regulation 2016/679 as "any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her.
8. "Individual" is defined in regulation 2(1) of PECR as "a living individual and includes an unincorporated body of such individuals".
9. A "subscriber" is defined in regulation 2(1) of PECR as "a person who is a party to a contract with a provider of public electronic communications services for the supply of such services".
10. Under section 55A (1) of the DPA (as amended by PECR 2011 and the Privacy and Electronic Communications (Amendment) Regulations 2015) the Commissioner may serve a person with a monetary penalty notice if the Commissioner is satisfied that –

“(a) there has been a serious contravention of the requirements of the Privacy and Electronic Communications (EC Directive) Regulations 2003 by the person, and

(b) subsection (2) or (3) applies.

(2) This subsection applies if the contravention was deliberate.

(3) This subsection applies if the person –

(a) knew or ought to have known that there was a risk that the contravention would occur, but

(b) failed to take reasonable steps to prevent the contravention.”

11. The Commissioner has issued statutory guidance under section 55C (1) of the DPA about the issuing of monetary penalties that has been published on the ICO's website. The Data Protection (Monetary Penalties) (Maximum Penalty and Notices) Regulations 2010 prescribe that the amount of any penalty determined by the Commissioner must not exceed £500,000.
12. PECR implemented European legislation (Directive 2002/58/EC) aimed at the protection of the individual's fundamental right to privacy in the electronic communications sector. PECR were amended for the purpose of giving effect to Directive 2009/136/EC which amended and strengthened the 2002 provisions. The Commissioner approaches the PECR regulations so as to give effect to the Directives.

13. The provisions of the DPA remain in force for the purposes of PECR notwithstanding the introduction of the Data Protection Act 2018 (see paragraph 58(1) of Part 9, Schedule 20 of that Act).

Background to the case

14. PHE first came to the attention of the Commissioner having been contacted by a third party, which was regulated by the Financial Conduct Authority ("FCA"), alleging that PHE had been engaging in unsolicited calls to individuals for the purposes of direct marketing relating to pension schemes. In doing this, PHE had allegedly been passing itself off as the third party.
15. The Commissioner subsequently consulted the FCA online register and contacted the FCA directly with regards to whether PHE was authorised to engage in such marketing calls. In doing so it was confirmed that neither PHE, nor its directors, were registered with the FCA, or authorised to make such calls.
16. On 9 September 2019 the Commissioner contacted the Communications Service Provider ("CSP") which was understood to be used by PHE, requesting call dialler records ("CDR"s) for all of the 'calling line identities' ("CLI"s) allocated to PHE between the period of 9 January 2019 to 8 September 2019.
17. The subsequent response from the CSP indicated that a total of 208,545 calls were made during this period from CLIs allocated to PHE.
18. In the specific circumstances of this case, the Commissioner believed it appropriate to make an application to Court for a warrant to search PHE's business premises in order to obtain information relevant to the alleged contravention. This warrant was granted and subsequently

executed on 3 October 2019. As a result, the Commissioner seized paper documents and electronic devices for review and analysis.

19. From the documents obtained, the Commissioner learned that amongst the methods used to collect data, PHE staff would seek to 'connect' with individuals on LinkedIn, and harvest the contact details provided on their personal accounts, in order to target them with direct marketing calls relating to pension schemes. A call script seized during the warrant makes specific reference to this as the method of obtaining an individual's data and confirms that PHE offer a service of tracking down frozen pensions, and providing an "up to date transfer valuation".
20. In addition, it is apparent that PHE purchased data from third party data providers although it was not clear whether this data was being used by PHE for its calls relating to pension schemes.
21. The Commissioner wrote to PHE on 25 October 2019 setting out her concerns with the organisation's compliance with PECR and asking for further information to assist with the Commissioner's investigation.
22. In its response of 27 November 2019, a director of PHE confirmed that data obtained via LinkedIn was PHE's only source of data, and that between 9 January 2019 and 3 October 2019 there were a total of 289,679 calls made, of which 39,722 were connected.
23. PHE provided no evidence that specific consent was sought from individuals on LinkedIn whose data was obtained. Furthermore, it was confirmed that neither PHE, nor a second organisation of which the director was in charge, was authorised by the FCA to conduct pension calls.
24. The Commissioner made further enquiries with PHE on 9 December 2019 and advised of her concerns with the way in which PHE had

obtained data via LinkedIn. Although PHE had previously confirmed that LinkedIn was the only source of data used, the Commissioner remained concerned by her findings from the warrant, not least regarding the possibility of data being obtained via third party sources, and asked for clarity on whether any such data was still being processed and for what purpose. PHE's response indicated that no such data was still being processed. PHE's response also confirmed that no training records are kept in relation to PECR training, nor are employees required to sign any documents to confirm that any such training has been undertaken.

25. The Commissioner notes that during the period of contravention she received a total of three complaints regarding calls from a CLI attributed to PHE. In addition, the Commissioner was notified by the FCA of a further complaint on 23 September 2019, about a call which had taken place on 16 September 2019, during the period of contravention.
26. The Commissioner has made the above findings of fact on the balance of probabilities.
27. The Commissioner has considered whether those facts constitute a contravention of regulation 21B PECR by PHE and, if so, whether the conditions of section 55A DPA are satisfied.

The contravention

28. The Commissioner finds that PHE has contravened regulation 21B of PECR.
29. The Commissioner finds that the contravention was as follows:

30. Between 9 January 2019 and 3 October 2019 PHE made a total of 39,722 connected unsolicited calls for the purposes of direct marketing in relation to occupational pension schemes or personal pension schemes contrary to regulation 21B of PECR. This resulted in a total of three complaints being made to the Commissioner.
31. The Privacy and Electronic Communications (Amendment) (No. 2) Regulations 2018, which came into force on 9 January 2019, amended PECR to insert Regulation 21B which restricts calls made for the purposes of direct marketing in relation to occupational pension schemes or personal pension schemes.
32. PHE would contact individuals, whose data had been scraped from LinkedIn contact lists, to discuss pension schemes with a view to arranging an introduction with an Independent Financial Advisor (“IFA”). Call scripts obtained from PHE’s own premises during the execution of a warrant demonstrate that PHE would make calls to subscribers to offer “up to date transfer valuations”.
33. The calls made by PHE clearly constitute ‘direct marketing in relation to occupational pension schemes or personal pension schemes’ within the definition of regulation 21B(5)(b)[ii] PECR. Specifically, regulation 21B(5)(b)[ii] PECR includes “the offer of any advice or other service that promotes, or promotes the consideration of, the withdrawal or transfer of funds from an occupational pension scheme or a personal pension scheme[...]”.
34. The Commissioner finds in the alternative that the calls could be said to constitute direct marketing in accordance with the definition provided at regulation 21B(5)(b)[iii] PECR. Specifically, regulation 21B(5)(b)[iii] includes “the offer of any advice or other service to enable the

assessment of the performance of an occupational pension scheme or a personal pension scheme (including its performance in comparison with other forms of investment)“.

35. To engage in such calls it is a requirement of regulation 21B PECR that the caller be an 'authorised person or a person who is the trustee or manager of an occupational pension scheme or a personal pension scheme'.
36. Regulation 21B(5)(a) PECR states that "authorised person" has the meaning given in Section 31 of the Financial Services and Markets Act 2000 ("FSMA"). Section 31(1) FSMA lists the categories of persons who would constitute "authorised persons".
37. PHE has provided no evidence that it would qualify as an "authorised person". In addition, the Commissioner is concerned by the tactics which PHE may have employed during its calls, i.e. there is evidence of multiple names and false authorisation numbers being quoted which would give individuals a misleading impression of the company.
38. Furthermore, PHE's listed 'Nature of business' on Companies House simply refers to it as being involved with "Market research and public opinion polling", and the Commissioner has seen no evidence that PHE is itself a trustee or manager of an occupational pension scheme or a personal pension scheme.
39. The Commissioner is therefore satisfied that PHE is not an authorised person for the purposes of regulation 21B PECR.
40. The Commissioner is also satisfied that PHE is not a trustee or manager of an occupational pension scheme or a personal pension scheme for the purposes of regulation 21B PECR.

41. Therefore, neither paragraphs 2 or 3 of regulation 21B apply, and PHE cannot lawfully make direct marketing calls in relation to occupational pension schemes or personal pension schemes.
42. Even if PHE were an authorised person or a person who is the trustee or manager of an occupational pension scheme or a personal pension scheme, the Commissioner is satisfied that PHE had neither the consent of those who it called, nor an existing customer relationship with them, as required by regulation 21B(2)(b) or (3)(b).
43. The Commissioner understands that PHE would obtain the details of individuals whom they intended to engage in direct marketing by having its staff add them as 'connections' on LinkedIn. Once connected, PHE would use the contact details provided on the individuals' personal account pages for the purposes of its marketing campaign. It was explained during the course of the investigation that PHE interpreted an individual's acceptance of a 'connection' request as confirmation that they would also consent to receiving direct marketing calls. This method of data scraping is wholly inadequate as a means of obtaining valid consent.
44. The Commissioner is satisfied that between 9 January 2019 and 3 October 2019 there were a total of 39,722 connected unsolicited calls for the purposes of direct marketing in relation to occupational pension schemes or personal pension schemes contrary to regulation 21B of PECR.
45. The Commissioner has gone on to consider whether the conditions under section 55A DPA are met.

Seriousness of the contravention

46. The Commissioner is satisfied that the contravention identified above was serious. This is because between 9 January 2019 and 3 October 2019 there were 39,722 connected unsolicited direct marketing calls made to subscribers in relation to occupational pension schemes or personal pension schemes by an organisation not lawfully authorised to carry out such activities, and without valid consent. From this the Commissioner has recorded a total of three complaints. This represents a significant intrusion into the privacy of the recipients of such calls. Furthermore, the Commissioner notes that a total of 289,679 calls were in fact made over the relevant period, which suggests that the extent of the contravention could potentially have been far higher.
47. The Commissioner notes that PHE were not registered at all with the FCA during the period of the contravention. Furthermore, it is understood that PHE had been previously contacted by West Sussex Trading Standards in April 2018 when its attention was drawn to the intended legislative change regarding pension calls, and to the need to consider PECR when making direct marketing calls. Although this contact pre-dated the current contravention, and indeed the implementation of regulation 21B PECR, it is pertinent that PHE had previously had its attention directly drawn to the requirement to consider PECR when engaging in direct marketing calls.
48. The Commissioner is therefore satisfied that condition (a) from section 55A (1) DPA is met.

Deliberate or negligent contraventions

49. The Commissioner has considered whether the contravention identified above was deliberate.
50. The Commissioner considers that PHE deliberately set out to contravene PECR in this instance.
51. The Commissioner considers that PHE employed deliberate and opaque tactics to obtain the data of individuals to whom they could engage in direct marketing regarding pension schemes, following the implementation of legislation specifically aimed at protecting individuals from these practices.
52. Further, and in the alternative, the Commissioner has gone on to consider whether the contravention identified above was negligent. This consideration comprises two elements:
 53. Firstly, the Commissioner has considered whether PHE knew or ought reasonably to have known that there was a risk that these contraventions would occur. She is satisfied that this condition is met, not least because the issue of unsolicited calls in relation to occupational pension schemes or personal pension schemes has been widely publicised by the media as being a problem, so much so that it prompted recent legislative change to prohibit the making of such calls unless certain conditions are met. It is reasonable to suppose that any organisation wishing to carry out such activities should, and indeed must, be aware of its responsibilities in this area. Furthermore, the proposed legislative change was expressly brought to PHE's attention by West Sussex Trading Standards prior to its implementation.
 54. The Commissioner has published detailed guidance on her website for those carrying out direct marketing calls for the purposes of pension schemes, explaining the strict criteria under which such calls can be

made. This guidance explains such calls must not be made in relation to pension schemes unless the person calling is a trustee or manager of a pension scheme or a firm authorised by the Financial Conduct Authority, and the individual being called has specifically consented to such calls or has a defined existing client relationship.

55. Secondly, the Commissioner has gone on to consider whether PHE failed to take reasonable steps to prevent the contraventions. Again, she is satisfied that this condition is met.

56. Reasonable steps in these circumstances may have included ensuring that it was, for the purposes of the legislation, an "authorised person". The Commissioner is of the view that if PHE had familiarised itself with the relevant legislation and clear Government and ICO guidance it would have realised that any exemption which it purported to rely on for the conducting of its business would not meet the required threshold of being "authorised" for the purposes of regulation 21B PECR, and accordingly it should have known that it could not lawfully make unsolicited direct marketing calls for the purposes of pension schemes. Additionally, there is no evidence that PHE sought to take independent legal advice, or to request advice from the Commissioner, prior to engaging in its direct marketing campaign in relation to pensions. When asked for its understanding of its obligations under PECR, PHE responded with reference to being unable to contact individuals on the Telephone Preference Service ("TPS") register. Registration for the TPS is irrelevant for the purposes of regulation 21B; this statement further suggests that PHE was unaware of its true obligations when looking to conduct direct marketing calls relating to pensions.

57. Furthermore, PHE have failed to provide any evidence of consent for the direct marketing calls made, indeed it appears reasonable to suggest that PHE engaged in its direct marketing campaign without giving any consideration at all to obtaining the valid consent of those individuals it sought to contact. It harvested data from LinkedIn with the aim of contacting those individuals for the purposes of pension schemes and, when asked, PHE was unable to evidence any consent, stating just that it had deleted the LinkedIn connections after contact.
58. The Commissioner is therefore satisfied that condition (b) from section 55A (1) DPA is met

The Commissioner's decision to issue a monetary penalty

59. The Commissioner has also taken into account the following **aggravating features** of this case:
- Pension calls, in particular, can lead to high levels of financial detriment and/or emotional stress. It is for this reason that the restriction on such calls was introduced;
 - The making of these calls would appear to be for financial gain as the organisation will profit from any business resulting from the calls;
 - PHE's responses to the Commissioner were not without delay;
 - The Commissioner has concerns from her investigation that there may be an attempt by PHE to "phoenix" its operation under a new guise.

60. The Commissioner is aware that PHE has recently been placed into creditors' voluntary liquidation. This type of insolvency does not prevent regulatory action being taken by the Commissioner.
61. For the reasons explained above, the Commissioner is satisfied that the conditions from section 55A (1) DPA have been met in this case. She is also satisfied that the procedural rights under section 55B have been complied with.
62. The latter has included the issuing of a Notice of Intent, in which the Commissioner set out her preliminary thinking. In reaching her final view, the Commissioner has taken into account the representations made by PHE on this matter.
63. The Commissioner is accordingly entitled to issue a monetary penalty in this case.
64. The Commissioner has considered whether, in the circumstances, she should exercise her discretion so as to issue a monetary penalty.
65. The Commissioner has considered the likely impact of a monetary penalty on PHE and notes its 'liquidation' status. However, in the particular circumstances of this case the Commissioner considers that a monetary penalty remains an appropriate and proportionate response.
66. The Commissioner's underlying objective in imposing a monetary penalty notice is to promote compliance with PECR. The making of unsolicited direct marketing calls, particularly in relation to pension schemes, is a matter of significant public and parliamentary concern. A monetary penalty in this case should act as a general encouragement towards compliance with the law, or at least as a deterrent against non-compliance, on the part of all persons running businesses currently

engaging in these practices. This is an opportunity to reinforce the need for businesses to ensure that they meet the strict criteria to engage in such activities and are only telephoning consumers who want to receive these calls.

The amount of the penalty

67. Taking into account all of the above, the Commissioner has decided that a penalty in the sum of **£45,000 (forty-five thousand pounds)** is reasonable and proportionate given the particular facts of the case and the underlying objective in imposing the penalty.

Conclusion

68. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by **14 January 2021** at the latest. The monetary penalty is not kept by the Commissioner but will be paid into the Consolidated Fund which is the Government's general bank account at the Bank of England.
69. If the Commissioner receives full payment of the monetary penalty by **13 January 2021** the Commissioner will reduce the monetary penalty by 20% to **£36,000 (thirty-six thousand pounds)**. However, you should be aware that the early payment discount is not available if you decide to exercise your right of appeal.
70. There is a right of appeal to the First-tier Tribunal (Information Rights) against:
- (a) the imposition of the monetary penalty
and/or;

- (b) the amount of the penalty specified in the monetary penalty notice.
71. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.
72. Information about appeals is set out in Annex 1.
73. The Commissioner will not take action to enforce a monetary penalty unless:
- the period specified within the notice within which a monetary penalty must be paid has expired and all or any of the monetary penalty has not been paid;
 - all relevant appeals against the monetary penalty notice and any variation of it have either been decided or withdrawn; and
 - the period for appealing against the monetary penalty and any variation of it has expired.
74. In England, Wales and Northern Ireland, the monetary penalty is recoverable by Order of the County Court or the High Court. In Scotland, the monetary penalty can be enforced in the same manner as an extract registered decree arbitral bearing a warrant for execution issued by the sheriff court of any sheriffdom in Scotland.

Dated the 7th day of December 2020.

Andy Curry
Head of Investigations
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

ANNEX 1

SECTION 55 A-E OF THE DATA PROTECTION ACT 1998

RIGHTS OF APPEAL AGAINST DECISIONS OF THE COMMISSIONER

1. Section 55B(5) of the Data Protection Act 1998 gives any person upon whom a monetary penalty notice has been served a right of appeal to the First-tier Tribunal (Information Rights) (the 'Tribunal') against the notice.

2. If you decide to appeal and if the Tribunal considers:-
 - a) that the notice against which the appeal is brought is not in accordance with the law; or

 - b) to the extent that the notice involved an exercise of discretion by the Commissioner, that she ought to have exercised her discretion differently,

the Tribunal will allow the appeal or substitute such other decision as could have been made by the Commissioner. In any other case the Tribunal will dismiss the appeal.

3. You may bring an appeal by serving a notice of appeal on the Tribunal at the following address:

General Regulatory Chamber
HM Courts & Tribunals Service
PO Box 9300
Leicester

LE1 8DJ

Telephone: 0300 123 4504

Email: grc@justice.gov.uk

- a) The notice of appeal should be sent so it is received by the Tribunal within 28 days of the date of the notice.
 - b) If your notice of appeal is late the Tribunal will not admit it unless the Tribunal has extended the time for complying with this rule.
4. The notice of appeal should state:-
- a) your name and address/name and address of your representative (if any);
 - b) an address where documents may be sent or delivered to you;
 - c) the name and address of the Information Commissioner;
 - d) details of the decision to which the proceedings relate;
 - e) the result that you are seeking;
 - f) the grounds on which you rely;
 - g) you must provide with the notice of appeal a copy of the monetary penalty notice or variation notice;

- h) if you have exceeded the time limit mentioned above the notice of appeal must include a request for an extension of time and the reason why the notice of appeal was not provided in time.
5. Before deciding whether or not to appeal you may wish to consult your solicitor or another adviser. At the hearing of an appeal a party may conduct his case himself or may be represented by any person whom he may appoint for that purpose.
6. The statutory provisions concerning appeals to the First-tier Tribunal (Information Rights) are contained in section 55B(5) of, and Schedule 6 to, the Data Protection Act 1998, and Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (Statutory Instrument 2009 No. 1976 (L.20)).